IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 498 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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DINESHBHAI HARISHBHAI SONKUSARE

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Revision Application No. 498 of 2004

MR ASHISH M DAGLI for Petitioner No. 1-4

MR. PRADIP D. BHATE, LD. APP for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 08/09/2004

ORAL JUDGEMENT

1. This Revision Application is preferred under Section 397 and 401 of the Code of Criminal Procedure,

1973 by the accused of Sessions Case No. 263 of 2002 pending before Learned Principal Judge, City Sessions Court, Ahmedabad against an order passed by Learned Principal Judge, City Sessions Court, below exhibit-31 on 20th May, 2004, rejecting an application of present petitioners accused for issuing summons to their defence witnesses.

2. A chargesheet against present petitioners was submitted before the City Sessions Court, Ahmedabad by Amraiwadi Police Station for the offence punishable under section 498-A, 306 of I.P. Code and under section 4 & 5 Dowry Prohibition Act, 1961 in respect of death of Vaishali, wife of present petitioner no.1. Present petitioners pleaded not guilty to the charges framed by Trial Court. Thereafter, the trial was proceeded and prosecution examined as many as about 10 witnesses, produced documents and closed the evidence. The statements of petitioners under section 313 of the Code of Criminal procedure were recorded by Learned Principal Judge, City Sessions Court on 23rd April 2004 in which present petitioners stated that they wanted to enter into defence and examine witnesses. Thereafter present petitioners submitted application at exhibit-31 on 23rd April, 2004 requesting the Sessions Court to issue summons to four witnesses as mentioned in Exh. 31 and petitioner No.1 herein sought permission to examine himself on oath.

3. On the same day i.e. on 23-4-2004 learned City Sessions Judge granted the said application with short order as "granted" and directed to issue summons accordingly. While on 18th May, 2004 Learned Principal Judge, City Sessions Court passed further order below the application Ex. 31 that the order passed earlier i.e. on 23-4-2004 granting the application exhibit-31 stands recalled because a copy of the said application was not furnished by the defence to learned Public Prosecutor. It appears that, thereafter a copy of application exhiit-31 might have been served by defence to learned Public Prosecutor. Thereafter, Learned Principal Judge, City Sessions Court on 20th May, 2004 passed further order on the said application Ex. 31, permitting the accused no.1, Dineshbhai Harishbhai Sonukusare to examine himself on oath and directed to issue summons to the witness from Sharda High Secondary School, while rest of the application Ex.31 to examine other defence witnesses came to be rejected. This order is impugned in this revision application.

4. Learned advocate Mr. Ashish M. Dagli for the

petitioners and learned APP Mr. Pradip D. Bhate for the State were heard at length.

5. Having heard the rival contentions and having perused record of the matter as well as the papers provided by learned advocate for the petitioners, it clearly appears that the order impugned in this revision application requires to be revised.

6. It is felt necessary to say that the object of the revisional jurisdiction of High Court under section 401 of Cr.P.C. is to confer power of a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, of irregularity of procedure, neglect of proper precaution, apparent harshness of treatment which has resulted in defeating the ends of justice. When a manifest illegality is noticed in revisional jurisdiction by a revisional court it becomes the duty of such court to iron out the creases of illegality and to smooth the path of justice under the statutory powers conferred by section 397 and 401 of Cr.P.C. This paternal power, therefore, is discretionary and must be exercised only in the interest of justice. Supervisory anxious attention must be focussed on each circumstances with utmost circumspection to sensitize whether failure of justice has occasioned.

7. The Code of Criminal Procedure, 1973 provides a comprehensive mechanism to conduct trials before the Courts by different methods. This mechanism achieves solemn object of fair trial to the accused as well as to the prosecution. In fact the object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well-understood lines that accord with our notion of natural justice. Throughout the web of Criminal Justice System of this country, golden thread is fair trial to accused, because cardinal Rule of Criminal Law, we follow is, each accused must be considered innocent till his guilt is established. Whatever be the merits of the case or whatever be the consequent result of the trial, the pious duty of the Court conducting the trial is to adhere strictly to the provisions of law ensuring fair trial.

8. It is necessary, therefore, to notice provisions from section 225 to 237 engrafted in Chapter-XVIII of Cr.P.C. 1973 for conducting trial before the Court of Sessions. So far as this revision application is concerned, Section 233 of the Code would be the governing provision which is reproduced as under :-

" Sec. 233. Entering upon defence.-- (1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. "

9. Mechanism of conducting of trial provides that the accused may enter into his defence after the prosecution evidence is over, and further statement of the accused under section 313 is recorded. Section 233 is obviously enacted to facilitate the accused to examine his witnesses in support of his defence. Therefore right of the accused to examine defence witnesses is statutory and is equally important as of the right of prosecution to examine witnesses to prove charge against the accused. Thus when a request is made by the accused before the Court of Sessions to issue summons to witnesses in his defence and examine them as defence witnesses, it becomes the duty of the Court to grant such request. It is to be seriously noted that the language of the Section is imperative and trial Court has no discretion under it to refuse to issue process to compel the attendance of any witnesses cited by the accused and the only fetter to said request is sub section (3) of section 233 of the Code in respect of the power of Sessions Judge to refuse such request on the ground that such request is made for the purpose of vexatious or delay for defeating the ends of justice. In that case opinion of trial Judge must be recorded in the order refusing such request indicating reasons for doing so. I do not find any such statement of such opinion of trial Judge in the order impugned.

10. The evidence which is recorded and copies of which are shown by learned advocate for the petitioners to this Court, reveal that it was the defence of the

petitioner accused right from the beginning that the deceased had committed suicide on account of her previous love affair, even prior to her marriage with accused no.1. In support of this defence the accused petitioners made request by preferring application exhibti-31 to examine certain witnesses including to examine accused no.1 Dineshbhai Harishbhai Sonkusare on oath. Apart from the order passed at the beginning for granting the request, then again revoking the order granting request, the last order which is subject matter of this revision application passed by Learned Principal Judge, City Sessions Court on 20th May, 2004; on thorough scrutiny, it is found that the request made by the petitioners to issue summons to the witnesses at Sr. No. 2,3, 4 and 5 of exhibit-31 was in any manner neither can be said to be vexatious or was a device to delay the trial and for defeating the ends of justice, especially in above view of the matter that this defence is unfolded by the accused right from the beginning. In absence of such circumstances, want of strict adherence to sub section (3) of section 233 of Cr.P.C. by the trial Judge, has resulted into manifest illegalities which can be cured only in this revisional jurisdiction.

11. Refusing to summon and examine defence witness as aforesaid is not only manifest illegality, but denying such opportunity to the accused may result quashing of conviction if at all accused visits such conviction in such circumstances. In the matter of RONALD WOOD MATHAMA AND ORS. Vs. STATE OF WEST BENGAL, as reported in AIR 1954 S.C. Pg. 455, while dealing with similar provision of Section 257 of the old Code (i.e. Code of 1898) Supreme Court observed in paragraph No. 10 as under:-

> "10. In coming to the conclusion that the guilt of the appellants had been established, the learned Judges were greatly influenced by the correspondence relating to the passing of the bill, in particular the letter of S.K. Dutt dated 23-1-1943 (Exhibit 18), by the long interval between the completion of the work which was in July 1942 and the alleged payments under Exhibit 27 series which were after 17-3-1943, and by various other circumstances, which probabilised the case for the prosecution. It must be conceded that the evidence on record tends to establish a strong case against the appellants. But then, that is a case which they are entitled to rebut, and if, as was held by the Federal Court, Exhibit 27 series would furnish good material for rebutting that case, the Court,

by declining to issue process for the examination of the witnesses connected with those documents, has deprived the appellants of an opportunity of rebutting it.

Whatever one may think of the merits of the appellants' contention, they cannot be convicted without an opportunity being given to them to present their evidence, and that having been denied to them, there has been no fair trial, and the conviction of the appellants, S.K. Dutt, J.K. Bose, and P.C. Ghose, cannot stand. The result may be unfortunate. But it is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. The appeals will be allowed, and the appellants acquitted."

12. In the above view of the matter this revision application deserves to be allowed and the order impugned is required to be revised and modified.

13. In the result this revision is allowed. Order passed by Learned Principal Judge, City Sessions Court on 20th May, 2004 below application exhibit-31 filed by the present petitioners in Sessions Case No. 263 of 2002 is revised and modified to the extent that application at exhibti-31 stands allowed in toto and the learned trial Judge is directed to issue summons to witnesses accordingly and examine them as defence witnesses. Rule made absolute.

Dt: 8-9-2004 ( J.R. VORA, J )

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